squamous cell carcinoma of the head and neck as a result of exposure to various petroleum products, was without any basis (Pet. App. 9a). The court also conditionally granted Respondents' motion for Summary Judgment, declining to apply *The Pennsylvania* Rule (Pet. App. 9a-10a). The District Court granted summary judgment, as to all defendants, by Opinion and Order dated July 9, 2002.

Subsequently, Petitioner appealed to the Second Circuit, contending the District Court abused its discretion by excluding expert testimony, not reopening discovery, and declining to apply *The Pennsylvania* Rule. The Second Circuit denied Petitioner's appeal in its entirety (Pet. App. 37a). The only issue before the Court is whether *The Pennsylvania* rule applies in a non-collision maritime Jones Act action, when the record is devoid of any nexus between the violation of a statute and the injury sustained.

REASONS FOR DENYING THE PETITION

I. There is no genuine conflict in the Circuits over the non-application of *The Pennsylvania* Rule in non-collision Jones Act actions where a plaintiff cannot prove a nexus between an injury and the alleged violation.

From the outset, it is important to note that there is no "majority" of Circuits, as alleged by Petitioner in her Petition, which apply *The Pennsylvania* Rule to non-collision maritime Jones Act cases when a plaintiff cannot demonstrate a nexus between the violation of a statute and the injury sustained. In fact, as discussed more fully below, the appellate courts that have reviewed these types of cases have reached the opposite conclusion. Moreover, as set forth more fully

infra, no genuine conflict exists among the Circuits concerning the application of *The Pennsylvania* Rule in non-collision Jones Act cases when a plaintiff is unable to show any nexus between the violation of a statute and the injury.

II. The Second Circuit's decision below is correct and consistent with this Court's prior decisions.

A. The Second Circuit rejects application of the Pennsylvania Rule where there is no nexus between the injury and the alleged violation.

The Second Circuit held that the burden shifting standard, established by this Court's decision in *The Pennsylvania*, *supra*, is inapplicable to the facts in this case. As set forth above, Petitioner failed to put forth any credible evidence that decedent's illness and death were related to a violation of a statute. The court, while acknowledging that *The Pennsylvania* Rule has not been limited to cases involving collisions, has "been cautious not to extend the Rule's application in ways that unmoor it from its animating principles." (Pet. App. 15a-16a). Moreover, "[i]n addition to requiring a nexus between the injury and the purpose of the legal obligation that was breached, our cases hold that the *The Pennsylvania* Rule will not create a presumption that the law's violation caused a calamity unless common sense or the realities of admiralty prompt that conclusion." (Pet. App.16a). The Second Circuit concluded, as the District Court did, that it could not say, with reasonable probability, that decedent's cancer was causally related to Respondents' alleged non-compliance.

B. This Court's prior decision in *Kernan v. American Dredging Co.*

This Court previously determined, in *Kernan v. American Dredging Co.*, 355 U.S. 425 (1958), that a nexus between the violation of a statute and the injury is required in order to shift the burden. In *Kernan*, a non-collision maritime case, a seaman's estate brought an action for damages resulting from loss of life on a dredging company's tug in a fire caused by the violation of a Coast Guard regulation The Court held that recovery was permitted because the violation of a Coast Guard regulation actually caused the seaman's death. However, the Court made it clear that liability attaches only if, "the resulting defect or insufficiency in equipment contributes in fact to the death or injury in suit . . ." *Id.* at 433.

Petitioner wrongly would apply *Kernan* to establish a new rule whereby a defendant is liable for a plaintiff's injuries each and every time it violates a statute, regardless of whether the violation of the statute is related to the injuries suffered by a plaintiff (Pet. Br. at 18). *Kernan* does not stand for such a proposition. While *Kernan* does expand the types of injuries for which a plaintiff may be able to recover, it does not relieve a plaintiff from the obligation of demonstrating that there is a nexus between violation of the statute and the injury. In fact, this Court, in reaching its conclusion, looked at a line of cases (involving Federal Employers' Liability Act violations) in which liability was imposed absent a finding of negligence. However, in each of those cases, a defect resulting from a violation of statute caused the injuries. *Id.* at 431.

C. The Second, Third, and Sixth Circuits are not inconsistent with the Court's rationale in its decision in *Kernan*.

Petitioner correctly points out that the Second, Third, and Sixth Circuits would not apply *The Pennsylvania* Rule in this case (Pet. Br. 8-11). Simply put, the Second, Third, and Sixth Circuits do not apply *The Pennsylvania* Rule in maritime non-collision Jones Act cases in situations in which there is no nexus between breach of a statute and the cause of the actual injury. As discussed in Sections III and IV, *infra*, the other Circuits cited by Petitioner (as well as the Alaska Supreme Court) also would decline to apply *The Pennsylvania* Rule under the facts of this case.

The Second Circuit

The Second Circuit has held that *The Pennsylvania* Rule does not apply in non-vessel collision actions, such as a seaman's personal injury action. *Director General of the India Supply Mission v. S.S. Maru*, 459 F.2d 1370, 1375 (2d Cir. 1972) ("Although the Pennsylvania rule is not now limited to collision cases [citations omitted], we are not inclined to apply it here."); *Wilkins v. American Export Isbrandtsen Lines*, 446 F.2d 480 (2d Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972); *Nolan v. Greene*, 383 F.2d 814, 817 (6th Cir. 1967).

The court has held that in such cases, the burden of proof is not shifted to defendant, and plaintiff must still show a causal connection between the alleged violation and the injury. In *Wilkins*, 446 F.2d 480 (involving a decedent who was required to work overtime after a previous collision had occurred and subsequently suffered a heart attack), plaintiff

argued that defendant had the burden to prove that its statutory violation not only did not, but could not have contributed to decedent seaman's death. *Id.* at 483. The court rejected plaintiff's argument and held that such an argument related to "the inescapable precondition to the liability that *there must be a causal connection between the tortious conduct of the defendant and the injury sustained by plaintiff.*" *Id.* at 483-84. [emphasis added]. The court held that plaintiff's reliance on *Kernan*, 355 U.S. 426, to circumvent the causal connection precondition, was misplaced and explained that the Supreme Court "did not go so far as to hold that a causal connection was presumed to exist between the statutory violation and the alleged injury." *Id.* at 484, citing *Nolan v. Greene*, 383 F.2d 814, 817 (6th Cir. 1967). The court explained that in *Nolan*, the Court of Appeals for the Sixth Circuit "expressly held that *Kernan* does not relieve the plaintiff of the burden of proving causation." *Id.*

Here, the District Court and Second Circuit relied on *Wilkins*, reaffirming the principle that *The Pennsylvania* Rule does not apply when a breach of a statute does not lead to a "natural and logical" conclusion that the breach was the cause of the injury (Pet. App. 18a).

The Third Circuit

In *Pierro v. Carnegie-Illinois Steel Corp.*, 186 F.2d 75 (3d Cir. 1950), the court declined to apply The *Pennsylvania* Rule in a Jones Act case. In *Pierro*, a widow brought an action against the employer of a vessel that was operating with one less crew member than was required by statute. The court rejected plaintiff's claim that the failure to provide an additional crew member, which ultimately resulted in the

decedent working over-time hours, was the direct cause of the decedent's heart attack and subsequent death, and refused to issue an instruction of presumptive causation. The court held:

> The special presumption relied upon by the plaintiff is a function in admiralty, effective to shift the burden of going forward with the evidence, used in the technique for determining fault of vessels involved in disasters. It is not directly derived from any statute, but is a product of a philosophy peculiar to United States admiralty law, that disasters are likely to occur when statutes passed for the express purpose of promoting safety in navigation are violated. We do not consider such a presumption appropriate to the instant controversy.

Id. at 78 (footnote admitted).

The Sixth Circuit

In *Epling v. M.T. Epling Co.*, 435 F.2d 732, 735 (6th Cir. 1970), *cert. denied sub nom.*, the court rejected the application of *The Pennsylvania* Rule to Jones Act cases. Decedent's wife filed a wrongful death action, claiming a breach of a Coast Guard regulation for excessive speed and incorrect pick-up. The court affirmed the district court's directed verdict for the defendant ruling:

> [T]he mere violation of a maritime statute or regulation does not establish liability. A causal connection between the violation and the injury must be shown. . . . Therefore the inquiry with

> respect to the defendant's [breach] is, as with the other allegations of negligence, whether there is any evidence from which a jury could reasonably infer that some negligent act or omission contributed to the decedent's death.

Id. at 735. Subsequently, this Court denied Certiorari on the issue. *Epling*, 435 F.2d at 736, *cert. denied*, 401 U.S. 963 (1971).

III. The jurisdictions cited by Petitioner tend to support Respondent's position.

Petitioner incorrectly asserts that the Fifth and Ninth Circuit Court of Appeals, along with the Alaska Supreme Court, constitute a majority position on this issue. Further, Petitioner's contention that the jurisdictions below would apply *The Pennsylvania* Rule to this case is unfounded.

A. The Fifth Circuit only applies *The Pennsylvania* Rule when the alleged violation plays a part in a plaintiff's injury.

In *Reyes v. Vantage Steamship Co.*, 609 F.2d 140 (5th Cir. 1980), an intoxicated seaman jumped thirty-five feet off a vessel into the water, and subsequently drowned while other seamen and officers watched while the seaman attempted to swim to a buoy. The *Reyes* court shifted the burden to the ship owner and subsequently found the shipowner liable for breaching a Coast Guard regulation (requiring the ship to have a powered line-throwing appliance capable of being thrown at least 1,500 feet worth of line).

The court based its decision on the fact that the shipowner's violation of the Coast Guard regulation was directly related to the decedent's death. Specifically, "the lack of the required line-throwing device, coupled with the shipowner's duty to rescue, established that the shipowner was negligent as a matter of law." *Id.* at 143. In reaching its decision, the court also referred to this Court's decision in *Kernan*, 355 U.S. 426, *supra*. It concluded that this Court "awarded Jones Act damages and expressly held that the type of Coast Guard regulation violated was irrelevant so long as the violation played any part in causing the injury." *Id. Reyes* is factually distinguishable from the instant case wherein it was determined, as a matter of law, that there was no evidence that Respondents' alleged violation played a part in decedent's injury and death.

B. The Supreme Court of Alaska requires a nexus between the injury and the alleged violation of statute.

Although not within the Federal Circuit, the Alaska case cited by Petitioner (set forth below) further supports Respondents' position. In *Marine Solution Services Inc. v. Horton*, 70 P.3d 393 (2003), the Supreme Court of Alaska concluded that *The Pennsylvania* Rule does not apply in non-collision maritime Jones Act actions, when it cannot be demonstrated that a nexus exists between the violation of a statute and the injury sustained. The court applied *The Pennsylvania* Rule when a seaman was injured while a towline snapped across the deck of his employer's tug boat, violating a Coast Guard regulation and an international regulation. However, application of the Rule was conditioned upon a finding of a link between the violation and the injury. In fact, the court unequivocally adopted "the majority

position set forth by the Ninth Circuit in *Mathes* [discussed, *infra*] that the Rule only applies if there is a nexus between the violation and the injury." *Id.* at 407.

Applying the rule set forth in *Marine Solutions* to the instant matter, *The Pennsylvania* Rule would not apply because there is no nexus between the alleged violation and the injury. Indeed, the Second Circuit below noted:

> [I]n failing to establish a nexus between benzene and PAH exposure and decedent's cancer, Dr. Bidanset indicated that "he is not even sure whether benzene is capable of causing Decedent's [squamous cell carcinoma].

(Pet. App. 7a).

C. The Ninth Circuit requires a nexus between the injury and the alleged violation of statute.

The Petitioner sets forth two cases which she claims support her argument that the Ninth Circuit applies *The Pennsylvania* Rule in similar non-collision Jones Act cases (Pet. App. 13). Respondent disagrees that the Ninth Circuit would apply The Rule to the instant matter. While there may be situations when the Ninth Circuit would apply the *The Pennsylvania* Rule in a non-collision Jones Act case, this case is not one of them.

Petitioner first cites *The Denali; Pacific Coast Coal Co. v. Alaska Steamship Co.*, 112 F.2d 952 (9th Cir. 1940). This case is not applicable to the issue now before the Court because it is a collision case and, therefore, does not require any discussion.

The second case cited by Petitioner, *Mathes v. The Clipper Fleet*, 774 F.2d at 980 (9th Cir. 1985), concerns a seaman who injured his ankle while transferring cargo between two ships. The seaman brought a Jones Act claim, contending *The Pennsylvania* Rule applied due to the fact that a Coast Guard regulation was violated by the captain's failure to have the correct credentials physically on board the ship. The court held *The Pennsylvania* Rule "inapplicable," concluding the "violation does not bring into play the *Pennsylvania* Rule because there is no conceivable causal connection between the violation and the injury. *Id.* at 983. The court also stated, "as the Supreme Court said in The *Pennsylvania* itself, 'it must be conceded that if it clearly appears the fault could have had nothing to do with the disaster, it may be dismissed from consideration.'" *Id.*, citing *The Pennsylvania*, 86 U.S. [19 Wall] at 136.

IV. Other Circuits are not "confused" and their decisions tend to support Respondents' position.

The Petitioner cites the Fourth Circuit's decision in *Mason v. Lynch Brothers Co.*, 228 F.2d 709 (4th Cir. 1956), in support of her argument that a third group of Circuits are confused and uncertain whether or not to apply *The Pennsylvania* Rule in non-collision Jones Act cases (Pet. App. 15). This contention lacks foundation. The Fourth Circuit's position, set forth in *Gosnell v. United States*, 262 F.2d 559 (4th Cir. 1959), decided subsequent to *Mason*, is clear. The court unequivocally declined to apply *The Pennsylvania* Rule in a Jones Act case in which it could not be determined that the defendant's violation caused plaintiff's injuries. The court held:

> The *Pennsylvania* rule does not apply where the physical cause of the damage is not known.

> Any plaintiff, marine or shoreside, who seeks to hold a defendant liable for injuries, must show: (1) the physical cause of his injuries; (2) fault on the part of the person sought to be held responsible; and (3) a causal connection between such fault and the physical cause. The *Pennsylvania* rule begins to operate after libelant has passed the second stage, but not before. The *Pennsylvania* rule does not shift the burden of proof on the first issue: the physical cause of the damage. *Such proof is always a part of libelant's case.* The argument advanced by claimants disregards the distinction between (1) the physical cause, or cause in fact, of a casualty, and (3) the causal connection between respondent's fault and the physical cause.

Id. at 563, quoting *The Yfnx-6*, 156 F. Supp. 325, 332 (D. Md. 1957) (emphasis altered).

Petitioner also contends that the First Circuit, in its decision in *Poulis-Minott v. Smith*, 388 F.3d 354 (1st Cir. 2004) only "grudgingly" applied *The Pennsylvania* Rule to a Jones Act case (Pet. App. 14). Again, Petitioner's assessment of the court's holding is incorrect. Specifically, in declining to apply the Rule, the court stated:

> Assuming arguendo that the Vessel was indeed in violation of these regulations, there is still another part of the rule which must be met before the court will shift the burden of proving causation. That is, the violation or "fault" must have contributed to the casualty, at least in some degree.

Id. at 364 (citation omitted).

Clearly the decisions of the Fourth and First Circuits support Respondents' position.

V. Petitioner's policy argument that the decision below conflicts with other Circuits and requires resolution is unfounded.

A. Public policy does not warrant resolution of the issue.

There is no conflict among the Circuits. However, public policy does not warrant this Court granting the instant Petition. The courts below relied on *Wilkins*, stating, "we were 'not persuaded that there are broad considerations of policy which require that we extend the admiralty rule of *The Pennsylvania* . . . to embrace Jones Act cases.'" quoting *Wilkins*, 446 F.2d at 486; *see also Pierro v. Carnegie-Illinois Steel Corp.*, 186 F.2d 75, 78 (3d Cir. 1950) (Pet. App. 19a). The courts below recognized that public policy does not warrant shifting the burden, viewing *The Pennsylvania* Rule as "a drastic and unusual presumption." *Dir. Gen. of India Supply Mission*, 459 F.2d at 1375 (quoting G. Gilmore & C. Black, The Law of Admiralty § 7-5, at 404 (1957)) (Pet. App. 14a).

B. The intent of the *Pennsylvania* Rule is properly served by the majority position and is consistent with this Court's "special solicitude" for seamen.

The decisions below, as well as the Circuits' decisions highlighted above, demonstrate an appreciation for the purpose of the Rule, namely protecting seamen in recognition of their daily risks. "[A]dmiralty courts have always shown a special solicitude for welfare of seamen and their families."

Miles v. Apex Marine Corp., 498 U.S. 19, 36 (1990). Public policy goals are achieved without having to shift the burden of proof in non-collision Jones Act cases where no nexus exists between the violation of the statute and the injury sustained. The Rule rests on the assumption that collisions between ships are the result of a faulty ship. *Wilkins*, 446 F.2d at 485. The same can not be said for wrongful death or personal injury matters in which there is no nexus between the violation of a statute and the injury. Simply put, there are instances, such as this case, where shifting the burden would not uphold the purpose of the Rule.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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No. 04-1640

In The Supreme Court of the United States

PATRICIA A. WILLS, individually and as personal representative of the Estate of RICKY LEE WILLS, deceased,

Petitioner,

v.

AMERADA HESS CORP., SPENTONBUSH/RED STAR COMPANIES., INC., SHERIDAN TRANSPORTATION CORP., and HYGRADE OPERATORS INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF

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REPLY BRIEF

The court of appeals in this case decided an important issue of maritime law in conflict with decisions of other courts of appeals and a state supreme court. Moreover, its holding is inconsistent with decisions of this Court. Respondents fail to rebut the conflict of authority or to explain the inconsistencies. They do not deny the importance of the issue. They do not deny that this case cleanly presents the issue and offers an ideal vehicle to resolve it. This Court should grant certiorari.

I. The state and lower federal courts are in irreconcilable and acknowledged conflict on the applicability of the *Pennsylvania* Rule in actions under the Jones Act

The petition identifies nine courts of appeals and one state supreme court that have addressed aspects of the issue raised here. *See* Pet. 7-16. At least three courts of appeals and the state supreme court are in square conflict on the question presented.

A. The restrictive position

For those courts of appeals that have adopted the restrictive position, *see* Pet. 7-11, respondents appear to be in substantial agreement with petitioner. They explicitly accept that "the Second Circuit held that [the *Pennsylvania* Rule] does not apply in a wrongful death action arising under the Jones Act." Opp. 1; *cf.* Pet. 8. They agree that the Sixth Circuit has "rejected the application of the *Pennsylvania* Rule to Jones Act cases." Opp. 10; *cf.* Pet. 8-9. And they go beyond the petition's suggestion that the Third Circuit might be aligned with the Second and Sixth Circuits, *see* Pet. 9-11, to argue that the Third Circuit is firmly in that camp, *see* Opp. 9-10 (thus making a fourth court of appeals part of the square conflict). Indeed,

respondents further strengthen the argument for certiorari by identifying a Fourth Circuit decision (not cited in the petition) that they argue adopts the restrictive position. *See* Opp. 14-15 (discussing *Gosnell v. United States*, 262 F.2d 559 (CA4 1959)). If respondents were correct,[1] five courts of appeals and a state supreme court would be in square conflict on the question presented in the petition.

B. The majority position

Respondents valiantly attempt to distinguish those cases that have adopted what the Alaska Supreme Court recently described as "the majority position." *Marine Solution Services, Inc. v. Horton*, 70 P.3d 393, 407 (Alaska 2003). They make this effort on two fronts. First, they suggest that the *Pennsylvania* Rule does not apply in "non-collision" Jones Act cases. *See, e.g.*, Opp. i. Second, they argue that the *Pennsylvania* Rule does not apply "when a plaintiff is unable to prove any nexus between the violation of a statute and the injury suffered." *Id.* Both of these arguments fail.

1. Respondents' "non-collision" suggestion can hardly be serious. Even the court below explicitly agreed with petitioner "that application of *The Pennsylvania* Rule has not been limited to cases involving collisions." Pet. App. 15a. The Second Circuit thus rejects that supposed distinction as a ground for its decision.[2] More significantly,

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[1] *Gosnell* is not directly relevant to the question presented here because that case did not involve a Jones Act claim. Moreover, the Fourth Circuit's analysis of the *Pennsylvania* Rule might be viewed as dictum because that court held that the defendant had in any event carried the burden of proof that the Rule would impose on it. *See* 262 F.2d at 562, 564. The Fourth Circuit's analysis might also be viewed as an application of the *Pennsylvania* dictum discussed *infra* at 4.

[2] Other decisions taking the restrictive position also arose in non-collision contexts, but those courts also failed to rely on the supposed

(Continued on following page)

neither of the principal cases in square conflict with the Second Circuit arose in a collision context – but the Alaska Supreme Court and the Fifth Circuit nevertheless applied the *Pennsylvania* Rule. In *Horton*, a seaman standing on the deck of a barge under tow was severely injured when the towline snapped across the deck. 70 P.3d at 400. The court rejected the argument that the *Pennsylvania* Rule is limited to collision cases. *Id.* at 406-07. In *Reyes v. Vantage Steamship Co.*, 609 F.2d 140 (CA5 1980), the seaman died when he leapt overboard and could not be rescued. Nothing that even arguably resembled a collision occurred in either case.[3]

2. Respondents' "nexus" argument fares no better. To understand the flaw in respondents' reasoning, it is necessary only to reexamine *The Pennsylvania*, 86 U.S. (19 Wall.) 125 (1874), and to recall its significance. Because the *Pennsylvania* Rule simply shifts the burden of proof on the issue of causation, *see* Pet. 2-5, the Rule is significant only when there is some doubt on that issue. When it is clear that the defendant's act must have caused the plaintiff's injury, it does not much matter how the burden of proof is allocated. If the plaintiff were required to prove causation, that burden would be easily carried; the fact of causation is already clear. Similarly, if the defendant must disprove causation, that burden would be impossible to carry. With either allocation, the result would be the same. At the opposite end of the spectrum – when it is clear that the defendant's act could not possibly have caused the

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distinction that respondents advocate here. *See Epling v. M.T. Epling Co.*, 435 F.2d 732, 735 (CA6 1970); *Pierro v. Carnegie-Illinois Steel Corp.*, 186 F.2d 75, 78 (CA3 1950). *Cf. Mason v. Lynch Brothers Co.*, 228 F.2d 709, 712 & n.3 (CA4 1956) (declining to decide the *Pennsylvania* Rule question but explicitly noting that the *Pennsylvania* Rule had been extended beyond the collision context).

[3] *See also Mathes v. The Clipper Fleet*, 774 F.2d 980, 982-83 (CA9 1985) (assuming the broad application of the *Pennsylvania* Rule in a non-collision case).

plaintiff's injury – it once again does not much matter how the burden of proof is allocated (for essentially the same reasons).

In *The Pennsylvania*, this Court recognized the logical significance of its Rule and declared in dictum that shifting the burden would be pointless "if it clearly appears the fault could have had nothing to do with the disaster." 86 U.S. at 136. The Ninth Circuit sensibly applied this dictum in *Mathes v. The Clipper Fleet*, 774 F.2d 980, 983 (CA9 1985), in which a defendant had violated a Coast Guard regulation because its deckhand did not have his required license physically on board the ship at the time of the accident. The court recognized that this technical violation could not possibly have had any causal connection with the plaintiff's injury and therefore declined to apply the Rule.

Although the *Pennsylvania* dictum is logical in its proper sphere, it does not eviscerate the underlying Rule with the "nexus" requirement that respondents advocate. *The Pennsylvania* itself illustrates the error of respondents' argument. Recall that the steamship asserted the sailing ship's fault in violating a statute requiring the use of a foghorn. *See* Pet. 4. This Court did not require the steamship "to prove any nexus between the violation of [the] statute and the injury suffered." Opp. i. Indeed, it appeared unlikely that the sailing ship's statutory fault *was* in fact a cause of the accident. And the Court fully recognized that the statutory breach might have been irrelevant, *i.e.*, that the accident might have happened even if a foghorn had been used. *See* 86 U.S. at 136-38. The Court noted that the British courts had already held that the speeding steamship was solely responsible for the accident. *See id.* at 129, 138. The Court "admitted" that it was mere "speculation," *id.* at 137, that a foghorn might have been heard at a greater distance than a bell (despite evidence to the contrary, *see id.* at 128-29, 135) and that the steamship's crew might have acted upon it in time, *see*

id. at 136-37. Nevertheless, the "speculation [was] rendered necessary by a certain fault of the [sailing ship]." *Id.* at 137. Shifting the burden of proof to the sailing ship was "necessary to enforce obedience to the mandate of the statute." *Id.* at 136.

The two principal cases in square conflict with the Second Circuit both applied the *Pennsylvania* Rule faithfully, as this Court intended, without any "nexus" requirement of the sort that respondents advocate. In *Horton*, the defendant violated two regulations: (1) its captain was operating a 123-ton vessel when his license was limited to vessels up to 100 tons and (2) it failed to maintain a proper lookout. 70 P.3d at 407-08. The plaintiff made no showing that either of these violations was related to his injury. On the contrary, the Alaska Supreme Court simply speculated that "the failure to maintain a lookout could reasonably have led to the series of events that resulted in Horton's injury." *Id.* at 408. Although the court suggests the need for some "nexus between the violation and the injury," *id.* at 407, this was in the context of its discussion of the Ninth Circuit's *Mathes* decision (which the *Horton* court described as holding "that there was no nexus between the violation and the injury," *id.*). In other words, the only "nexus" that *Horton* appears to require is a speculative connection rising above the level at which "it clearly appears the fault could have had nothing to do with the disaster" (to quote the *Pennsylvania* dictum that *Mathes* applied, *see supra* at 4). To suggest that *Horton* requires anything more is to accuse the Alaska Supreme Court of departing from the standard of *The Pennsylvania* even as it purported to apply the Rule.

The Fifth Circuit's detailed discussion of this issue in *Reyes* is even clearer. The shipowner was in breach of "Coast Guard regulations requir[ing] the ship to have a rocket powered line-throwing appliance capable of throwing at least 1,500 feet of line," 609 F.2d at 143, when a seaman drowned "beyond reach of a hand-thrown line or

life ring," *id.* at 142. Chief Judge Brown carefully explained the causation problems that would face the district court on remand. *Id.* at 144. Some of the problems included:

> [D]etermin[ing] whether there was time for a crew member to go to the hypothetical storage location, obtain the hypothetical line-throwing appliance, move it to the appropriate firing location, and fire the appliance – all before Reyes went limp in the water. . . .
>
> [Determining] whether it was reasonable to use the now-prepared line-throwing appliance. There is some possibility that a line or lines fired over or near Reyes might have harmed him or perhaps have impeded his labored swimming. . . .
>
> [Determining] whether actually firing the line would probably in fact have saved his life.

Id. at 144. As this discussion demonstrates, the *Reyes* court built speculation on top of speculation to show that the defendant's statutory violation *might* have contributed to the seaman's death. And just as in *The Pennsylvania* itself, the Fifth Circuit applied the Rule to impose the burden of dealing with this speculation on the party whose statutory violation had made it necessary. *Id.* at 144-46. The plaintiff was not subjected to any "nexus" requirement.[4]

The one court of appeals that appears to have applied anything like respondents' "nexus" requirement is the First Circuit in *Poulis-Minott v. Smith*, 388 F.3d 354 (CA1 2004). As the petition explains, that court's grudging application of the Rule is inconsistent with *The Pennsylvania*, with the result that the Rule applies in First

---

[4] Respondents appear to recognize that they have no real basis for distinguishing *Reyes*. *See* Opp. 3 ("the Fifth Circuit, arguably, might decide this matter differently").

Circuit Jones Act cases only when its application is least relevant. *See* Pet. 14 & n.11. The existence of this distinct position further illustrates the need for this Court's guidance.

Despite respondents' "nexus" argument, the decision below is squarely in conflict with both *Horton* and *Reyes*, for the nexus between respondents' statutory violation and Wills's death is just as strong as any nexus that was established in those two cases (or in *The Pennsylvania*, for that matter). Benzene is known to be a carcinogen. Exposure to excessive levels of benzene causes at least some kinds of cancer. It stands to reason that Wills's exposure to excessive levels of benzene might have contributed to his squamous cell carcinoma. Even respondents do not claim that "it clearly appears" that their statutory violation "could have had nothing to do with" Wills's illness and subsequent death,[5] although that is the standard that this Court has announced for dispensing with the burden-shifting rule. *See* 86 U.S. at 136.

C. Summary

The court of appeals acknowledged that its decision was in conflict with decisions of the Fifth Circuit and the Alaska Supreme Court. *See* Pet. App. 20a (citing *Reyes*; *Horton*). The Alaska Supreme Court similarly saw that its *Horton* decision was in conflict with the settled Second Circuit rule. *See* 70 P.3d at 407 n.46 (citing and quoting *Wilkins v. American Export Isbrandsten Lines, Inc.*, 446 F.2d 480 (CA2 1971)). Academic commentators have noted the conflict in the scholarly literature. *See* Pet. 16. Respondents stand alone in contending that the cases are

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[5] Respondents instead focus on petitioner's failure to carry the burden of proof imposed by the Second Circuit. *See, e.g.*, Opp. 3 (petitioner "failed to prove any nexus"); *id.* at 5 ("plaintiff cannot demonstrate a nexus"); *id.* at 6 ("plaintiff is unable to show any nexus").

distinguishable. Their argument is unpersuasive. This Court should now grant certiorari and resolve the long-established conflict that has become more entrenched in the last two years.

II. The Second Circuit rule is inconsistent with the decisions of this Court confirming the general maritime law's "special solicitude" for seamen

Respondents recognize and accept the "special solicitude" that admiralty courts show for the "welfare of seamen and their families." Opp. 16 (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 36 (1990)). They assert that the decision below is consistent with this "special solicitude." Opp. 16-17. But they make no effort to explain how this assertion could be true when the decision denies seamen and their families the same rights that the *Pennsylvania* Rule gives to property claimants. *See* Pet. 17.

Moreover, respondents do not address the inconsistencies between the Second Circuit's rule and this Court's decisions in *Kernan v. American Dredging Co.*, 355 U.S. 426 (1958), and *Garrett v. Moore-McCormack Co.*, 317 U.S. 239 (1942). *See* Pet. 18-19. They do not even cite *Garrett*. *See* Opp. vi. Their discussion of *Kernan* both mischaracterizes this Court's holding and ignores petitioner's argument.

As the petition explains, *Kernan* did not directly implicate the *Pennsylvania* Rule because there was no cause-in-fact dispute. Pet. 18. Thus *Kernan* did not hold "that a nexus between the violation of a statute and the injury is required in order to shift the burden," Opp. 7, or "that recovery was permitted because the violation . . . actually caused the seaman's death," *id.* These issues were not before the Court. *Kernan* instead addressed the seaman's obligations to prove negligence and proximate cause. Petitioner would not "apply *Kernan* to establish a new rule," Opp. 7, but does find it perverse that the Second

Circuit refuses to apply a widely accepted maritime-law rule that merely shifts the burden of proving factual causation when this Court has shifted the more serious negligence and proximate cause burdens in the same context. Respondents have not addressed this perversity. *Cf.* Opp. 7.

III. The decision below cleanly presents an important issue that this Court should resolve

Respondents do not dispute the importance of the issue. *Cf.* Pet. 19. Indeed, they appear to accept that enforcement of the Rule will have an impact on the extent to which employers observe Coast Guard regulations. *See* Opp. 2 ("'[The *Pennsylvania*] rule is necessary to enforce obedience to the mandate of the statute.'") (quoting *The Pennsylvania*, 86 U.S. at 136).

Respondents do not dispute that the issue is well-percolated. *Cf.* Pet. 19. Since the petition was filed, yet another appellate decision has been reported that directly addresses the issue and follows the "majority rule." *See Smith v. Tidewater Inc.*, ___ So.2d ___, 2005 AMC 972, 982-83, 2005 WL 775803, *7-8 (La. App. 2005). Appellate courts have now addressed this issue in published opinions at least four times in the past 27 months.[6] The issue is ripe for this Court's review.

Respondents do not dispute that maritime law demands uniformity; that Wills worked regularly in the ports and navigable waters of the First, Second, Third, Fourth, Fifth, and Eleventh Circuits; and that a lack of uniformity would be an invitation to forum shopping. *Cf.* Pet. 20-21.

Finally, respondents do not dispute that this case offers an ideal vehicle to resolve this important issue. *Cf.*

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[6] In addition to the decision below, *see Horton*, *supra*; *Poulis-Minott*, *supra*; *Smith v. Tidewater*, *supra*.